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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB13

March 6, 2018

VIA U.S. MAIL & EMAIL

Fleur McKendell
44 East Fred Circle
Camden, DE 19934
mckendellf@gmail.com

Re: FOIA Correspondence Concerning the Delaware Department of Insurance

Dear Ms. McKendell:

I write in response to your correspondence alleging that the Delaware Department of Insurance violated the public records provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§10001-10007 ("FOIA"). I treat your correspondence as a petition for a determination pursuant to 29 *Del. C.* §10005 regarding whether a violation of FOIA has occurred or is about to occur ("Petition"). Specifically, you allege that DOI violated FOIA by denying your request for certain records.¹ For the reasons set forth below, it is my determination that DOI did not violate FOIA as alleged.

On or about February 3, 2018, you sent a FOIA request to DOI for "any and all electronic correspondence to the request, review, processing, approval or denial of Fleur McKendell's (self) ADA accommodation requests dated from 8/1/2017 through 2/3/2018. The State of Delaware Microsoft Outlook email accounts that would likely prove responsive to this request include but are not limited to: Fleur McKendell (Department of Insurance), Frank Pyle (Department of Insurance), Jenifer Vaughn (Department of Insurance), Stuart Snyder (Department of Insurance) and Jessica Willey (Attorney General's Office and Department of Insurance). certain information related to your employment." On February 23, 2018, DOI denied your request pursuant to 29 *Del. C.* § 10002(l)(1), which provides that "[a]ny personnel, medical or pupil file, the disclosure of

¹ Your Petition included additional allegations concerning DOI that are beyond the scope of FOIA and, as a result, are not addressed herein.

which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy” is not a public record.

“Public record,” as defined by FOIA, “is information of any kind, owned, made, used, retained, received, produced, composed, drafted or otherwise compiled or collected, by any public body, relating in any way to public business, or in any way of public interest, or in any way related to public purposes, regardless of the physical form or characteristic by which such information is stored, recorded or reproduced.”² However, the statute also provides that certain categories of information “shall not be deemed public.”³ Among those categories of information that are exempted from FOIA’s definition of “public record” is “[a]ny personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy.”

Importantly, Delaware’s FOIA provides that “[a]ll public records shall be open to inspection and copying during regular business hours by the custodian of the records for the appropriate public body.”⁴ In other words, if a record meets FOIA’s definition of “public record,” then the public body must make the record available for inspection and copying to *any* Delaware citizen who requests access thereto. Similarly, if the record does *not* meet FOIA’s definition of “public record,” then Delaware’s FOIA does not mandate its disclosure and a public body cannot be found to have violated FOIA for failing to disclose the record *in response to a FOIA request*. Of course, that is not to say that the requesting party has no legal entitlement whatsoever to the requested records. However, any such entitlement would have no basis in Delaware’s FOIA and is therefore beyond the scope of our role in this context.

Here, the record demonstrates that you requested information from DOI pursuant to Delaware’s FOIA. Similarly, you have invoked the petition process contained in 29 *Del. C.* § 10005(e) to challenge DOI’s response. Section 10005(e) requires me to issue a written determination of whether a *FOIA violation* has occurred.⁵ Under the circumstances, I am satisfied that the requested information is exempted from FOIA’s definition of “public record” pursuant to 29 *Del. C.* § 10002(l)(1).⁶ Indeed, you appear to acknowledge the confidential nature of the records, as you have specifically alleged that DOI has denied you “access to confidential

² 29 *Del. C.* § 10002(l).

³ *Id.*

⁴ 29 *Del. C.* § 10003(a)(1) (emphasis added).

⁵ See 29 *Del. C.* § 10005(e) (“Any citizen may petition the Attorney General to determine whether a violation of *this chapter* has occurred or is about to occur.”) (emphasis added).

⁶ I note that DOI has also invoked DOI also invoked specific provisions of the Code of Federal regulations. However, having determined that the requested information is exempted from FOIA pursuant to 29 *Del. C.* § 10002(l)(1), I need not consider whether the information is also exempted pursuant to 29 *Del. C.* § 10002(l)(6) (exempting (“[a]ny records specifically exempted from public disclosure by statute or common law”).

information pertaining to [your]self.” Accordingly, it is my determination that DOI did not violate *FOIA* in denying your request. You may wish to consult with counsel regarding your entitlement, if any, to any of the requested records outside of the *FOIA* context.⁷

Very truly yours,

A handwritten signature in black ink, appearing to read 'A. Goldstein', written over a horizontal line.

Aaron R. Goldstein
Chief Deputy Attorney General

cc: Kathleen Makowski, Deputy Attorney General (via email)
Michelle E. Whalen, Deputy Attorney General (via email)

⁷ See, e.g. 19 *Del. C.* §§ 731 and 732.